

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



Count

76-6009

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

MARCELINA DIAZ RIVERA DE GOMEZ,

Appellant-Plaintiff,

-v-

HENRY A. KISSINGER, Secretary of  
State of the United States, et al,

Appellees-Defendants.

Appeal No.

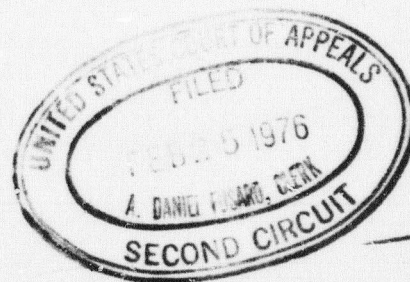
76-6009

APPELLANT'S BRIEF

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FEBRUARY, 1976



## INDEX

	<u>Page</u>
Statement of the Issue.....	1
Statement of the Case.....	2
Jurisdiction.....	4
<u>Argument</u>	
<u>POINT I.</u> The District Court has subject matter jurisdiction pursuant to Sec. 279 of the Act.....	4
<u>POINT II.</u> The District Court abused its discretion in vacating Marcelina's notice to take the Consul's deposi- tion and for pre-trial discovery.....	6
<u>POINT III.</u> The conflict between the parties' Rule 9(g) statements prevents the grant of summary judgment.....	7
<u>Conclusion</u> .....	7
<u>Statutes Involved</u>	
Immigration and Nationality Act of 1952	
Section 201(b), 8 U.S.C. Sec. 1151(b).....	8
Section 221(g), 8 U.S.C. Sec. 1201(g).....	8
Section 279, 8 U.S.C. Sec. 1329.....	9
<u>Cases Cited.</u>	
<u>Kleindienst v. Mandel</u> , 408 U.S. 753 (1972).....	5
<u>Rhoads v. McFerran</u> , 517 F.2d 66 .....	7
<u>U.S. ex rel. Ulrich v. Kellogg</u> , 30 F.2d 984.....	5

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APPELLANT'S BRIEF

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STATEMENT OF THE ISSUE

Whether the District Court had jurisdiction pursuant to Section 279 of the Immigration and Nationality Act of 1952, to review final agency action (a) by the Immigration and Naturalization Service, pursuant to Section 201(b) of the Act, and (b) by the American Consul, pursuant to Sec. 221(g) of the Act, where such action (a) revoked an approved petition filed by plaintiff-appellant to classify her husband as her immediate relative and (b) refused an immigrant visa to the husband of plaintiff-appellant on the alleged ground that the marriage was one

of convenience for immigration purposes.

STATEMENT OF THE CASE

Plaintiff-appellant Marcelina Diaz Rivera de Gomez ("Marcelina") is a United States citizen by birth. (R.7a). In 1974 she was married in Santo Domingo, Dominican Republic to one Cecilio Trifilio Gomez-Tejada ("Cecilio"). (R.8a). Thereupon, Marcelina petitioned the defendant Immigration and Naturalization Service ("INS") pursuant to Sec. 201(b) of the Immigration and Nationality Act of 1952 ("the Act") to accord Cecilio the status as her "immediate relative".

The Immigration and Naturalization Service granted the petition and forwarded it to the American Consul at Santo Domingo, Dominican Republic. However, the Consul commenced an ex parte investigation as to Cecilio's life history. On the basis of the results of such investigation, the Consul denied an immigrant visa to Cecilio, apparently pursuant to Section 221(g) of the Act, and returned the petition to the Service in New York. Essentially, the Consul cast doubt upon the validity of Marcelina's marriage to Cecilio by making an ex parte

determination that such marriage had been entered into for immigration purposes. Neither Marcelina nor Cecilio were given an opportunity to be heard in rebuttal.

Thereupon, Marcelina filed this action requesting a declaration by the District Court that her marriage to Cecilio is present, valid and effective and, further, commanding the defendant Consul to process Cecilio's application for an immigrant visa on the basis of such declaration.

The defendants answered (R.11a) and interposed the defenses of lack of jurisdiction over the subject matter and failure to state a claim upon which relief could be granted.

Marcelina then noticed (R.13a) the taking of the deposition of the defendant Consul and sought discovery of the documents on the basis of which Cecilio had been denied an immigrant visa. On motion of the defendants, the District Court vacated the notice and stayed discovery. (R.15a).

Following the entry of the Order, the defendants moved for summary judgment (R.15a). The District Court

granted this motion (R.26a) and this appeal (R. 28 a) was taken from its Order and Judgment.

#### JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1291.

#### ARGUMENT

POINT I. The District Court has subject matter jurisdiction pursuant to Sec. 279 of the Act.

The final decision below (R. 26a) dismissing this action is short but misses the point.

Marcelina's brief in opposition (Document #20 of the certified record) to the defendants' motion to dismiss did forcefully urge the District Court to deny the motion for the simple reason that Section 279 of the Act had done away with any doubt as to the jurisdiction of the District Court to review "final agency action" taken by the Immigration and Naturalization Service pursuant to Section 201(b), or by American Consuls pursuant to Section 221(g). That was the sole question for decision on that motion and it was error for the District Court not to rule on Marcelina's argument.

In ruling on defendants' motion, the District Court relied on two decisions, Kleindienst v. Mandel, 408 U.S. 753, 762 (1972) and U.S. ex rel. Ulrich v. Kellogg, 30 F.2d 984, (DC. Circ.) cert. denied sub. non. U.S. ex rel. Ulrich v. Stimson, 279 U.S. 868 (1929).

Since the decision in Ulrich antedates the 1952 Act by 30 years, it can be easily distinguished. The issue is not whether Ulrich governs the case at bar but whether Sec. 279 of the Act confers jurisdiction upon the District Court to review "final agency action" taken by the I.N.S. pursuant to Sec. 201(b) and by the Consul pursuant to Sec. 221(g).

Mandel is also distinguishable. Mandel dealt with the First Amendment rights of American scholars to hear, speak and debate with Mandel in person. 408 U.S. @762. It had nothing to do with Sec. 201(b) or 221(g) proceedings. It did reach the question of the Attorney General's powers to grant a waiver to Mandel, who had been found excludable pursuant to Section 212(a) (28).

POINT II. The District Court abused its discretion in vacating Marcelina's notice to take the Consul's deposition and for pre-trial discovery.

On defendants' motion which was made for variety of reasons, the District Court entered an Order (R.15a) vacating Marcelina's notice to take the deposition of the Consul and for pre-trial discovery. It is not clear from the lower court's memorandum just which "administrative remedies" Marcelina was expected to exhaust. (While the record does not show it, Marcelina did exhaust her "administrative remedies" as to which the final decision of the District Court is silent).

Since Marcelina was denied an opportunity to examine the Consul, the record is barren of any indication as to the Consul's true reasons in denying Cecilio an immigrant visa. One or two examination sessions would have been sufficient in order to elicit from the Consul her true reasons for denying a visa to Cecilio. And, of course, Marcelina would have been made available for examination by the Consul and by the I.N.S., at the same time and place.

Thus, the record comes to the Court without the "sifting of the issues" which is a prerequisite to summary judgment, as this Court has said, repeatedly.

POINT III. The conflict between the parties' Rule 9(g) statements prevents the grant of summary judgment.

In Rhoads v. McFerran, 517 F.2d 66('75) this Court reversed a summary judgment entered upon conflicting Rule 9(g) statements.

The defendants' 9(g) statement (R.16a) and Marcelina's (R. 26a) are sharply in conflict. Therefore summary judgment was improvidently granted by the Court below.

CONCLUSION

For the reasons stated, the judgment below should be vacated and the cause remanded for a decision on the merits.

Respectfully submitted:

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STATUTES INVOLVED

28 U.S.C. Sec. 1291

Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States,\*\*\* except where a direct review may be had in the Supreme Court.\*\*\*

Immigration and Nationality Act of 1952  
Section 201(b), 8 U.S.C. Sec. 1151(b)

Immediate relatives defined

(b) The "immediate relatives" referred to in subsection (a) of this section shall mean the children, spouses, and parents of a citizen of the United States: Provided, That in the case of parents, such citizen must be at least twenty-one years of age. The immediate relative specified in this subsection who are otherwise qualified for admission as immigrants shall be admitted as such, without regard to the numerical limitations in this chapter.

Sec. 221(g), 8 U.S.C. Sec. 1201(g)

Non-issuance of visas or other documents

(g) No visa or other documentation shall be issued to an alien if (1) it appears to the consular officer, from statements in the application or in the papers submitted therewith, that such alien is ineligible to receive a visa or such other documentation under section 1182 of this title, or any other provision of law, (2) the application fails to comply with the provisions of this chapter, or the regulations issued thereunder, or (3) the consular officer knows or has reason to believe that such alien is ineligible to receive a visa for such other documentation under section 1182 of this title, or any other provision of law: Provided, That a visa or other documentation may be issued to an alien who is within the purview of subsection (a) (7) or (15) of section 1182 of

this title, if such alien is otherwise entitled to receive a visa or other documentation, upon receipt of notice by the consular officer from the Attorney General of the giving of a bond or undertaking providing indemnity as in the case of aliens admitted under section 1183 of this title: Provided further, That a visa may be issued to an alien defined in section 1101(a) (15) (B) or (F) of this title, if such alien is otherwise entitled to receive a visa, upon receipt of a notice by the consular officer from the Attorney General of the giving of a bond with sufficient surety in such sum and containing such conditions as the consular officer shall prescribe, to insure that at the expiration of the time for which such alien has been admitted by the Attorney General, as provided in section 1184(a) of this title, or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under section 1258 of this title, such alien will depart from the United States.

Immigration and Nationality Act of 1952 Sec. 279,  
8 U.S.C. Sec. 1329.

#### Jurisdiction of district courts

The district courts of the United States shall have jurisdiction of all causes, civil and criminal arising under any of the provisions of this subchapter. It shall be the duty of the United States attorney of the proper district to prosecute every such suit when brought by the United States.\*\*\*

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Thomas J. Cahill

UNITED STATES ATTORNEY

2-25-76

m.b.